

BRB No. 08-0364

R.F.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BLACK WARRIOR WIRELINE)	DATE ISSUED: 09/16/2008
CORPORATION)	
)	
and)	
)	
ZURICH AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Joseph J. Weigand, Jr., Houma, Louisiana, for claimant.

Jeffrey I. Mandel (Juge, Napolitano. Guilbeau, Ruli, Frieman & Whiteley), Metairie, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2006-LHC-1982) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a wireline operator for employer, alleges that a specific work incident occurred on July 22, 2005, which caused his current back condition. Claimant testified that on the day of this alleged incident he was working, along with seven other employees, on the liftboat *Challenger*. Claimant stated that July 22, 2005, was a hot day with no wind. Following lunch that afternoon, claimant became dizzy and began to experience cramps.¹ Claimant was taken first to the galley, then to the vessel's bathroom where he was told to take a shower in order to cool down. *See* Tr. at 66 - 69. Claimant testified that he put his head in the shower, that he went in and out of consciousness, and that he commenced vomiting. Claimant testified that his co-workers then reentered the bathroom to find him curled-up on the shower floor. Claimant, who was unable to speak at this time due to his exhaustion, was placed in a crewboat, transported to the shore, and taken to West Jefferson Hospital in the company of Mr. Foster, where he was treated with fluids and diagnosed with, *inter alia*, dehydration, heat exhaustion, muscle cramping, and renal failure. CX 12 at 3, 13.

During this period of time, claimant did not inform either his co-workers or the hospital staff that he had fallen in the shower, CXs 12, 21, and on July 23, 2005, he was released from the hospital. On July 25, 2005, claimant was interviewed by employer regarding the events of July 22, 2005; claimant at that time did not relate his having fallen in the shower nor did claimant state that he fell in his signed written statement contained in employer's Supervisor's First Report of Injury. EX 7 at 4 - 6. On July 28, 2005, claimant sought treatment with Dr. Weir for, *inter alia*, back pain, and he stated to that physician that it was possible that he passed out and that he was not certain whether or not he may have fallen in the shower while at work. CX 13 at 1. Claimant underwent an MRI and EMG which revealed a disc herniation at L5 - S1. On August 10, 2005, claimant underwent an aortic valve replacement and he has not returned to gainful employment.² On January 4, 2006, claimant filed a claim for compensation under the Act asserting that he "passed out and fell" in a shower, injuring his back, while working for employer. EX 2. In controverting claimant's claim, employer stated that it had no report of claimant either passing out or falling in a shower. EXs 4, 5.

In his Decision and Order, the administrative law judge found that claimant was not a credible witness and that he failed to establish that the alleged specific work incident, a fall in a shower, of July 22, 2005, occurred. Accordingly, having found that claimant failed to establish his *prima facie* case, the administrative law judge denied the claim for benefits under the Act.

¹ Claimant testified that he had experienced cramping the previous day, July 21, 2005, that he drank various fluids throughout that afternoon and evening, and that he felt better upon commencing work on the morning of July 22, 2005.

² Claimant does not contend that his pre-existing heart murmur or heart surgery is related to his employment with employer. *See* Tr. at 33 - 34.

On appeal, claimant contends that the administrative law judge erred in denying of his claim for benefits under the Act. Employer responds, urging affirmance.

Claimant challenges the administrative law judge's determination that claimant did not establish that he fell in the shower while working for employer on July 22, 2005. The Section 20(a) presumption, 33 U.S.C. §920(a), aids a claimant in proving his injury is related to his employment. The presumption applies only to the claim actually made by claimant. *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982). In order to establish a *prima facie* case and invoke the Section 20(a) presumption, claimant must prove both that he sustained a physical injury, or harm, and that the claimed accident occurred or working conditions existed which could have caused or aggravated his harm. See *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *Bolden v. G.A.T.X. Terminals Corp.*, 30 BRBS 71 (1996). It is claimant's burden to establish each element of his *prima facie* case. See *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989); see also *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Before the administrative law judge, claimant asserted that a definitive work incident, specifically a fall in the shower, occurred on July 22, 2005, which caused his present back condition. See Tr. at 39 - 40; Clt's post-hearing br. at 57. See also EX 2. The administrative law judge discredited claimant's testimony and concluded that the specific fall described by claimant did not occur. In rendering this determination, the administrative law judge noted that claimant testified at the hearing that while his memory of the events which transpired while he was in the shower of the liftboat on July 22, 2005, was hazy, he had no doubt on that day that he fell and that he specifically recalled doing so on the day of the alleged fall. See Tr. at 92 - 93, 114 - 116. The administrative law judge found, however, that claimant, once he became lucid, did not inform either his co-workers or the medical personnel at the hospital that he had fallen, nor did he mention a fall in the written statement that he provided to employer on July 25, 2005. Additionally, the administrative law judge found that claimant did not mention a fall at work to Dr. Ladd, his treating cardiologist, and that claimant stated to Dr. Weir on July 28, 2005, that he was not sure whether he had in fact fallen and struck his back. Rather, it was not until October 4, 2005, that claimant definitively reported to Dr. Cenac that he had fallen in a shower while at work. The administrative law judge further found that the record contains multiple examples of inconsistencies and misstatements made by the claimant; specifically, the administrative law judge found that claimant was not forthcoming in disclosing his prior back conditions and treatment, as well as his use of medication. Decision and Order at 26 - 27.

Having found claimant's testimony was not credible, the administrative law judge concluded that claimant failed to establish that the alleged fall on July 22, 2005, occurred. After a review of the record, we affirm the administrative law judge's findings because they are rational, supported by substantial evidence, and in accordance with law. See

O’Keeffe, 380 U.S. 359. It is well-established that, in arriving at his decision, the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. See *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2^d Cir. 1961). Accordingly, the administrative law judge’s credibility determinations are not to be disturbed unless they are inherently incredible or patently unreasonable. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979); see *Bolden*, 30 BRBS 71. The administrative law judge considered claimant’s statements regarding his awareness as of July 22, 2005, that he had fallen on that day in the shower, his failure to inform either co-workers or hospital personnel of the alleged fall, his failure to document the alleged fall in his written statement to employer on July 25, 2005, and his testimony regarding his prior medical condition and treatment, and concluded that claimant’s testimony was unreliable. On the basis of the record before us, the administrative law judge’s decision to discredit the testimony of claimant is neither inherently incredible or patently unreasonable. Accordingly, we affirm the administrative law judge’s determination that claimant failed to establish the occurrence of the accident which forms the basis for his claim. As claimant failed to establish an essential element of his *prima facie* case, his claim for benefits was properly denied.³ *U.S. Industries*, 455 U.S. 608, 14 BRBS 631; *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27(CRT) (9th Cir. 1988); *Bolden*, 30 BRBS 71.

³ We reject claimant’s contention that the case must be remanded because the administrative law judge’s findings are inconsistent on their face. While, as claimant asserts, the administrative law judge’s decision contains a sentence stating that claimant carried his burden of establishing that a specific work incident occurred on July 22, 2005, Decision and Order at 27, the administrative law judge’s discussion of the evidence is consistent with his conclusion that claimant failed to carry his burden.

Accordingly, the administrative law judge's Decision and Order is affirmed.
SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge